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May 26, 1992

Federal Communications Commission  
Office of the Secretary

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: In the Matter of The Telephone Consumer  
Protection Act of 1991, CC Docket No. 92-90

Dear Ms. Searcy:

The Investment Company Institute<sup>1</sup> is writing with respect to FCC Notice of Proposed Rulemaking 92-176 ("NPRM"), which was issued by the Commission pursuant to the Telephone Consumer Protection Act of 1991 ("Act"). Our comments relate to the portion of the NPRM concerning telephone solicitations made by live persons to residential subscribers.

As noted in the NPRM, the Act specifies that the term "telephone solicitation" does not include calls to any person with whom the caller has an established business relationship. While the Act does not contain a definition of the term "established business relationship," the legislative history makes it clear that the Act is not intended to cover, among other things, calls by a mutual fund manager to existing shareholders or follow-up calls to investors who had written to a fund or responded to an ad requesting additional information. (A copy of the relevant excerpt from the report of the House Energy and Commerce Committee on the version of the legislation reported by the Committee is attached.)

If the Commission determines that it is necessary to adopt rules restricting live solicitations to residential subscribers, the Institute recommends that the Commission include in such rules provisions interpreting the term "established business

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<sup>1</sup>The Investment Company Institute is the national association of the American investment company industry. Its membership includes 3,479 open-end investment companies ("mutual funds"), 247 closed-end investment companies and 12 sponsors of unit investment trusts. Its mutual fund members have assets of about 1.307 trillion, accounting for approximately 95% of total industry assets, and have about 36 million shareholders.

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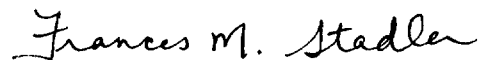
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relationship" to make it clear that the types of calls described above are not subject to the Act or rules thereunder. In this regard, we propose that the Commission define "established business relationship" to include any prior or current relationship between a business entity and a called party based on a transaction, negotiation, request for information or other inquiry.

In addition, we believe that the Commission should construe the term "established business relationship" to encompass certain circumstances in which separate entities are involved in a common business enterprise. For example, in the mutual fund context, the fund's administrator (which normally would be the entity to engage in telemarketing) should be deemed to have an "established business relationship" with customers of the fund's investment adviser. Interpreting the term not to apply in this situation would be inconsistent with such customers' reasonable expectations. More importantly, it would place unaffiliated service providers at a competitive disadvantage without providing any additional protection to consumers' privacy rights.

If you have any questions concerning the foregoing comments, please contact the undersigned at (202) 955-3514.

Sincerely,

A handwritten signature in cursive script that reads "Frances M. Stadler".

Frances M. Stadler  
Assistant Counsel

*Exemption of established business relationships*

the bill reflects a balance the Committee reached between barring all calls to those subscribers who objected to unsolicited calls, and a desire to not unduly interfere with ongoing business relationships. To provide as much protection as possible to the former interest while respecting the latter, the Committee adopted an exception to the general rule—that objecting subscribers should not be called—which enables businesses to continue established business relationships with customers.

The Committee considered whether and under what circumstances a telephone subscriber could be solicited by telemarketers notwithstanding the fact that the subscriber is listed in a national database, or otherwise protected from unsolicited calls through an alternative mechanism. The Committee found that subscribers' objections to telemarketing initiatives were twofold. The first element pertains to the volume of unwanted calls. The second involves the unexpected nature of the calls. That is, the absence of any current or prior dealings with the caller was the source of many objections.

The Committee concluded that an enterprise having an "established business relationship" with a subscriber should be permitted to solicit the subscriber even if the subscriber otherwise objected to unsolicited calls. The existence of the relationship at the time of the solicitation, or within a reasonable time prior to it, would form the basis for the new solicitation, provided that it substantially relates to the products or services forming the basis of the relationship.

Under the exception adopted by the Committee, an established business relationship would include a business entity's existing customers, for which an established business relationship is clearly present. Therefore, magazines, cable television franchises, and newspapers all could call their current subscribers to continue their subscriptions even if such subscribers objected to "unsolicited" commercial calls. Similarly, credit card companies could call current cardholders, including holders of affiliated cards. Stockbrokers or lawyers could call current clients at home to discuss existing portfolios or ongoing legal cases. In the case of mutual funds, calls by the fund's manager to existing shareholders would not be covered. In addition, if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund's manager could make follow-up calls, which would not be subject to H.R. 1304's restrictions.